

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
Tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543-RSL

DECLARATION OF CHRISTOPHER
I. BRAIN IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

I, Christopher I. Brain, declare as follows:

1. I am a member of Tousley Brain Stephens PLLC, attorneys of record for Plaintiff Swinomish Indian Tribal Community, am competent to testify and make this declaration based upon my personal knowledge.

2. I have personally reviewed the files and records produced by Plaintiff in response to discovery requests by Defendant related to the legal disputes between the Tribe and BNSF captioned *Swinomish Tribal Community v. Burlington Northern Railroad*, No. C76-550V (the “Trespass Litigation”) and *Burlington Northern Railway v. Andrus, et al*, No. CV 79-1199V (the “Right of Way Request Litigation”), collectively referred to as the “Prior Litigation.”

3. Right of Way Request Litigation. In the 1970's, the Tribe and Burlington Northern ("BN") entered into discussions to attempt to resolve disputes between them over use of the railway crossing the reservation. They were unsuccessful and BN filed an application for a right of way with the Bureau of Indian Affairs ("BIA"), under 25 U.S.C. 312 et seq. The application was rejected by the BIA because the Tribe refused to consent to the grant of a right of way easement across the reservation. BN processed the administrative appeals through the Department of Interior which ultimately affirmed the rejection based on a failure to obtain the Tribe's consent. BN then filed the Right of Way Request Litigation challenging the necessity of obtaining the Tribe's consent as a condition prior to grant of a right of way. This case was ultimately resolved after the Ninth Circuit decided *Southern Pacific Trans. Co. v. Watt*, 700 F.2nd 550 (9th Circuit 1983) which held that tribal consent was required as a condition of granting a right of way across a reservation.

4. Trespass Litigation. The Trespass Litigation was commenced by the Tribe against BN and a number of other defendants relating to trespass on Tribal lands. This case, with respect to BN, was resolved by the execution of the Settlement Agreement and Right of Way Easement subject of this litigation.

5. On January 21, 2016, we provided counsel for BNSF with the vast majority of the documents in the Tribe's possession related to the Prior Litigation and provided the few remaining documents by February 19, 2016. Those documents included (i) historical correspondence related to the initial construction of the railway in 1889, (ii) the historical documents from then through the filing of the Prior Litigation, (iii) pleadings related to the Prior Litigation, (iv) correspondence and documents related to and documenting the negotiation of the Settlement Agreement and Right of Way. Attached hereto as Exhibits are true and correct copies of specific documents related to the Prior Litigation and settlement of the Trespass Litigation.

Exhibit 1: August 23, 1889 letter from W.H. Talbot, U.S. Indian agent to Honorable Commission of Indian Affairs.

1 Exhibit 2: August 28, 1889 letter from W.H. Talbot, agent, to R.O. Belk, Acting
2 Commissioner of Indian Affairs.

3 Exhibit 3: September 10, 1889 letter from Assistant Commissioner, Office of
4 Indian Affairs to W.H. Talbot.

5 Exhibit 4: October 17, 1889 letter from Commissioner, Office of Indian Affairs,
6 to W.H. Talbot.

7 Exhibit 5: April 26, 1890 letter from Acting Commissioner, Office of Indian
8 Affairs to McDonald, Bright & Fay, Attorneys at Law.

9 Exhibit 6: December 27, 1890 letter from Assistant U.S. Attorney to W.H. Talbot.

10 Exhibit 7: Swinomish Tribal Senate Resolution No. 77-08-463 dated August 2,
11 1977.

12 Exhibit 8: Swinomish Tribal Senate Resolution No. 77-12-487 dated December
13 7, 1977.

14 Exhibit 9: August 15, 1977 memorandum from the Superintendent, Western
15 Washington Agency, forwarding Resolution No. 77-08-463 to the Portland Area Director.

16 Exhibit 10: September 27, 1977 letter and Application from Burlington Northern
17 to Superintendent, Western Washington Agency, Bureau of Indian Affairs for Railroad
18 Right of Way Across Swinomish Indian Reservation.

19 Exhibit 11: October 3, 1977 letter from Superintendent, Bureau of Indian Affairs
20 to Portland Area Director.

21 Exhibit 12: October 5, 1977 letter from Native American Relief Fund to John
22 Benedetto, Superintendent, Bureau of Indian Affairs, Western Washington agency.

23 Exhibit 13: October 17, 1978 letter from Superintendent, Western Washington
24 Agency, to Burlington Northern notifying it that Tribal consent is required for issuance
25 of right of way.

26 Exhibit 14: Swinomish Tribal Senate Resolution No. 78-10-554 dated 1978.
27

1 Exhibit 15: Complaint for Injunctive and Declaratory Relief in the Trespass
2 Litigation dated July 18, 1978.

3 Exhibit 16: Answer and Counterclaim for Injunctive and Declaratory relief by
4 Burlington Northern in Trespass Litigation dated September 11, 1978.

5 Exhibit 17: November 10, 1978 letter enclosing the October 17, 1998 appeal by
6 Burlington Northern from the decision refusing to file an application for right of way.

7 Exhibit 18: Answer of Swinomish Tribal Community to Burlington Northern
8 appeal dated December 1, 1978 along with copies of the July 19, 1978 letter from the
9 U.S. Department of Interior and the Order on Motion for Partial Summary Judgment
10 dated May 28, 1978 in the Southern Pacific Transportation Company litigation referenced
11 in the Answer.

12 Exhibit 19: May 4, 1979 Decision by the Area Director of the Bureau of Indian
13 Affairs denying the Burlington Northern appeal.

14 Exhibit 20: May 25, 1979 letter appeal by Burlington Northern appeal of the May
15 4, 1979 decision.

16 Exhibit 21: September 5, 1979 letter decision by the Acting Deputy
17 Commissioner of the Bureau of Indian Affairs denying the Burlington Northern appeal.

18 Exhibit 22: Complaint dated October 12, 1979 filed by Burlington Northern in
19 the Right of Way Request Litigation.

20 Exhibit 23: Order entered February 21, 1980 joining the Tribe as a party in the
21 Right of Way Request Litigation.

22 Exhibit 24: Order dated October 10, 1980 deferring decision on motion for
23 summary judgment pending Court of Appeals decision in Southern Pacific appeal.

24 Exhibit 25: Order dated August 16, 1983 granting summary judgment to the Tribe
25 in the Right of Way Request Litigation.

26 Exhibit 26: Notice of Appeal by Burlington Northern dated September 15, 1983.
27

1 Exhibit 27: Entry of Dismissal of Right of Way Request Litigation entered
2 February 22, 1984.

3 Exhibit 28: Settlement Agreement dated September 24, 1990 in the Trespass
4 Litigation.

5 Exhibit 29: Right of Way Easement - Burlington Northern dated July 19, 1991.

6 Exhibit 30: Conceptual Development Plan for Tribe's economic development
7 dated May 15, 1987.

8 Exhibit 31: June 5, 1989 letter from Richard Dauphinais to Lawrence Silvernale
9 with draft copies of the Settlement Agreement and Right of Way Easement.

10 Exhibit 32: June 22, 1989 letter from Lawrence Silvernale to Richard Dauphinais.

11 Exhibit 33: July 10, 1989 letter from Lawrence Silvernale to Richard Dauphinais
12 and Allan Olson.

13 Exhibit 34: Motion of the Interstate Commerce Commission for Leave to
14 Intervene in the Trespass Litigation.

15 Exhibit 35: Order entered March 7, 1980 denying Motion to Intervene.

16 Exhibit 36: Swinomish Tribal Senate Resolution No. 89-8-73 dated August 1,
17 1989 approving and attaching copies of the Settlement Agreement and Right of Way
18 Easement.

19 Exhibit 37: July 6, 1990 letter and Application for Right of Way by Burlington
20 Northern.

21 Exhibit 38: Letter dated November 27, 1990 from the U.S. Department of Interior
22 Deputy Solicitor recommending the United States approve the settlement.

23 ///

24 ///

25 ///

26 ///

1
2 I declare under penalty of perjury of the laws of the state of Washington that the
3 foregoing is true and correct.

4 DATED this 10th day of March, 2016.

5
6 By: /s/ Christopher I. Brain
7 Christopher I. Brain, WSBA #5054
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing all counsel of record.

DATED at Seattle, Washington, this 10th day of March, 2016.

/s/ Christopher I. Brain

Christopher I. Brain, WSBA #5054

cbrain@tousley.com

Attorneys for Plaintiff

TOUSLEY BRAIN STEPHENS PLLC

1700 Seventh Avenue, Suite 2200

Seattle, Washington 98101

Tel: 206.682.5600

Fax: 206.682.2992